

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COMMERCIAL LAW CORPORATION,
P.C.,

No. 10-13275

Plaintiff,

District Judge Sean F. Cox

v.

Magistrate Judge R. Steven Whalen

FEDERAL DEPOSIT INSURANCE
CORPORATION,

Defendant.

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ORDER FOLLOWING IN CAMERA REVIEW

Pursuant to the Court's Order of November 16, 2012 [Doc. #171], as amended on November 21, 2012 [Doc. #175], I have conducted an *in camera* review of 597 emails from the time period of October 6, 2009 through February 6, 2012, sent to the Court by Plaintiff's internet service provider. On December 10, 2012, the Plaintiff filed objections to every one of these emails [Doc. #176]. The Plaintiff's objections fall into three categories: "Not relevant," "Attorney/Client Privilege," and "Trial Prep Privilege." While many of Plaintiff's relevance objections are well-taken, a number of emails (33), especially those referencing Home Federal Savings and its Board, and the FDIC, are clearly pertinent to this litigation, and Plaintiff's blanket objection to *every* email suggests a troubling inclination to improperly conceal relevant evidence.

The emails that were sent by Yahoo! were placed on a CD in "mbox" format. The written instructions sent with the CD described "mbox" as follows: "This is the format in which the mailbox is stored on the server. The messages in the mailbox are placed into a single text file (mbox format). The snapshot may have been supplied to you on a CD or

DVD.” The numbered emails specified on Plaintiff’s log sometimes include email chains, that is, messages and responses, rather than discrete individual emails. Moreover, while the dates and subject lines in Plaintiff’s log correspond to the emails in the text file, the times do not. Fortunately, a word-search function enabled me to match each email or email chain with the corresponding objection.¹

Based on my *in camera* review, I find that the following emails, listed in Exhibit A of Plaintiff’s objections [Doc. #176-1], and objected to on the basis of relevance, are indeed relevant to this litigation under the broad standard of relevance contemplated by Fed.R.Civ.P. 26:

<u>No.</u>	<u>Date</u>	<u>Title</u>
2	10-6-09	Home Federal Savings
3	10-6-09	Board Meeting
12	10-6-09	Home Federal
13	10-6-09	Home Federal
14	10-6-09	Home Federal Savings
16	10-7-09	Home Federal Savings
19	10-8-09	Home Federal Savings
22	10-9-09	Home Federal
25	10-9-09	Draft Presentation for Board Meeting
26	10-9-09	Draft Presentation for Board Meeting
27	10-9-09	Draft Presentation for Board Meeting
38	10-13-09	Home Federal
72	10-17-09	Board Members
82	10-19-09	Home Federal
86	10-19-09	Home Federal
90	10-20-09	Home Federal
91	10-20-09	Home Federal
93	10-20-09	Home Federal Savings
141	10-23-09	Home Federal Savings
146	10-24-09	Home Federal
154	10-26-09	Home Federal
179	10-28-09	Home Federal
180	10-28-09	Home Federal
213	11-6-09	Home Federal Savings

¹ I wish to acknowledge the invaluable assistance of the Court’s IT Department in retrieving the text of these emails.

In addition, Plaintiff has objected to certain emails involving Home Federal Savings and the FDIC on the basis of attorney-client privilege. However, as the FDIC correctly notes, once it was appointed receiver to Home Federal Savings, it held the privilege. 12 U.S.C. § 1821(d)(as successor, FDIC succeeds to “all right, titles, powers, and privileges of the insured depository institution”); *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86–87, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (“the FDIC as receiver ‘steps into the shoes’ of the [pre-existing institution], obtaining the rights ‘of th[e] institution’ that existed prior to receivership”); *Odmark v. Westside Bancorporation, Inc.*, 636 F.Supp. 552m 554 (W.D. Wash. 1986)(as receiver, the attorney-client privilege previously held by the financial institution is transferred to the FDIC). Therefore, the following emails are discoverable²:

<u>No.</u>	<u>Date</u>	<u>Title</u>
3	10-6-09	Special Board Meeting
4	10-6-09	Special Board Meeting
22	10-9-09	Home Federal
146	10-24-09	Home Federal
178	10-27-09	FDIC
199	11-3-09	Home Federal
217	11-8-09	Home Federal Savings/FDIC (½)
227	11-10-09	Home Federal
228	11-11-09	Former Home Federal

Accordingly, Plaintiff’s objections to the 33 above-enumerated emails are overruled. Plaintiff shall, within 14 days of the date of this Order, produce to Defendant’s counsel copies of all of the 33 above-enumerated emails. If a particular numbered email is comprised of an email chain, Plaintiff shall produce the entire email chain.

As to the remaining emails that are not specifically enumerated herein, Plaintiff’s objections are sustained.

² There are, of course, a number of emails, not involving Home Federal Savings, to which the privilege is properly asserted.

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Corp.

IT IS SO ORDERED.

Dated: September 27, 2013

s/R. Steven Whalen
R. STEVEN WHALEN
UNITED STATES MAGISTRATE JUDGE

I hereby certify that a copy of the foregoing document was sent to parties of record on September 27, 2013, electronically and/or by U.S. Mail.

s/Michael Williams
Case Manager to the
Honorable R. Steven Whalen